IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS
OR IS NOT APPROVED FOR REPORTING.
[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 848/2001
Old No. 2043/1987

Mahendra Singh Appellant.

Vs.

State Respondent.

Decided on 22-03-2006

A.F.R. (Approved for Reporting)
~~Not approved for reporting~~

(P.C. Verma, J.)

(B.C. Kandpal, J.)

Dated : 22-03-2006

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 848/2001
Old No. 2043/1987

Mahendra Singh S/o Laxman Singh
R/o Village Harora,
P.S. Gagal Heri District
Saharanpur ……. Appellant.

Versus

State ……. Respondent.

Sri Sidhartha Shah, learned counsel for the appellant.
Sri H.C. Pandey, learned A.G.A. assisted by
Sri M.C. Joshi, A.G.A..

Coram: Hon'ble P.C. Verma, J.
Hon'ble B.C. Kandpal, J.

Dated: 22-03-2006.

(Per: Hon'ble B.C. Kandpal, J.)

This criminal appeal has been preferred by the appellant against the judgment and order dated 10-8-1987, passed by the Special Judge/Addl. Sessions Judge, Nainital, in S.T. No. 216/1984, whereby the accused/appellant was held guilty for an offence U/S 302 I.P.C. and sentenced to undergo imprisonment for life.

2- The prosecution version which led to the trial of the accused/appellant is as follows:-

Janardan Pathak was the Gatekeeper of Tada Crossing Peepal Parao Range. On 17-6-1984, in between 6.50 P.M. and 7.15 P.M., at Tanda crossing, P.S. Lalkuan, when Janardan Pathak was coming from his hut and proceeding towards tea shop, accused/appellant Mahendra Singh (hereinafter called as appellant), who was a police constable, fired shot at him with his service gun, how died on the spot due to gun shot injury. The motive for commission of murder of the deceased was that the deceased had complained to the Head Constable P.S. Lalkuan about the wrong activities of the accused. After the incident, the appellant informed the police that shot was fired from his service gun and got a case registered at P.S. Rudrapur under Sections

342, 353, 332 I.P.C. The rifle and cartridges were deposited at the police station vide fard Ext. Ka. 5. The appellant had also injuries on his person, hence he was sent to hospital along with Head Moharir for treatment. S.I. J.P. Singh along with police force went at the place of the incident. At the spot D.F.O. and A.C.F. were present and they wanted that the inquest of dead body of deceased be got done by S.D.M., hence the dead body of the deceased was brought to P.S. Rudrapur and the inquest on the dead body was performed By Addl. S.D.M. on 18-6-1984 in between 10-30 A.M. and 11.00 A.M. and inquest report, Ext. Ka.2 was prepared and sealed the dead body. The Addl. S.D.M. got prepared police form No.33,Ex.Ka.15, sketch dead body, Ext. Ka. 18, sample seal, Ext. Ka.19, letters to Medical Officer, Civil Hospital, Haldwani Ext. Ka. 16 and Ka.17, and sent the dead body for post mortem.

3- The post mortem on the dead body of the deceased was conducted by the Medical Officer, Civil Hospital, Haldwani on 18-6-1984 at about 3.30 P.M. The Medical Officer has found the following injuries on the person of the deceased:-

(i) Gun shot wound 1cm x ¾ cm oval in shape on right side chest. Cavity deep. Inverteral margins, 13 cm below and lateral to right nipple and 16 cm above the right iliac crest with tattooing around the wound.

(ii) Wound of exist 9 cm x 9cm left side abdomen, 5cm lateral to umbilicus, 16cm below the left nipple. Margins were irregular and everted and cavity deep. Loops of intestine coming out.

In the opinion of the doctor the death was caused due to shock and haemorrhage. The death was caused about one day ago. The Post mortem examination report is Ext. Ka.11.

3- The incident was witnessed by Chatur Singh , Jagdish Chandra Kothari, Forest Guard, Dungar Singh, watchman, Indra Singh Negi and Ramesh Chandra Joshi. Chatur Singh informed Ram Kishore Singh about the incident, who went to Police Station, Lalkuan and handed over the written report, Ext. K.1 to S.H.O. On the basis of written report, chick F.I.R., Ext. Ka.8 was

prepared on the same day, i.e., 17.6.1984 at 8.45 P.M. Case crime No. 94/ 1984 U/s 302 I.P.C. was registered against the appellant on the same day as per report No. 30 at 8.45 P.M., Ext. Ka.9, by Head Constable Ramanand Tyagi.

4- The investigation of the case was conducted by Ajai Pal Singh. On 17-6-1984 he went at the spot and took into possession the blood-stained and simple earth vide recovery memo, Ext. Ka.4. The blood-stained earth and the Tahmad, underwear and undershirt of the deceased were sent for chemical examination. The Chemical Examiner has submitted its report, Ext.Ka.27. According to this report the earth, Tahmad, underwear and undershirt had disintegrated blood-stains. He recorded the statement of Chatur Singh and on 18-6-1984 inspected the spot and prepared site-plan, Ext. Ka. 6, of the place of the occurrence. On 19-6-1984 the I.O. took into possession a rifle and a 303 bore cartridge duly sealed from P.S. Rudrapur and handed over at P.S. Lalkuan, the entry of which was made at report No. 39 at 0.45 P.M., Ext.Ka.10. On transfer of this witness, the rest investigation was conducted by S.O. B.K. Juyal, who after completion of investigation, submitted charge sheet, Ext. Ka.7 against the appellant.

5- After the appellant was committed to the court of Sessions, the trial Judge charge U/s 302 I.P.C. against the appellant to which he pleaded not guilty and claimed to be tried.

6- The prosecution, in support of its case, examined 11 witnesses. P.W.1, Ram Kishore Singh is the informant. He has stated on oath that on 17-6-1984, Chatur Singh, Forest Moharir at about 7.15 P.M. informed that constable Mahendra Singh has fired shot from his service gun at Janardan Pathak, the gatekeeper of Tanda Crossing. This witness also deposed that he atonce reached at the spot and found Janardan Pathak lying dead there. He went to the P.S. Lalkuan and lodged the F.I.R. there. He has proved the F.I.R., Ext. Ka.1.

7- P.W.2, Chatur Singh has stated that on 17.6.1984 at about 6.45 P.M. he, Indra Singh Forest Guard and Ramesh Chandra Joshi, were taking tea in a shop, near the place of occurrence. The

appellant Mahendra Singh was sitting on a cot in front of the hut of Sukhpal. The appellant told Janardan Pathak as to why he made his complaint to Head Constable and asked him to come out of his Chauki. At this Janardan Pathak came out of the Chauki and the appellant fired gun shot at him, which hit on the right side of his stomach and he fell down at the spot and died. This witness also deposed that the incident was witnessed by Jagdish Chandra Kothari, Dungar Singh, Forest Guard, Indra Singh and Ramesh Chandra Joshi.

8- P.W.3, Indra Singh Forest Guard, P.W.4, Ramesh Chandra Hoshi, Plantation Jamadar, P.W.5, Jagdish Chandra Kothari Forest Guard, and P.W.8, Dungar Singh, are eye witnesses of the incident and have supported the prosecution version as narrated by P.W.2, Chatur Singh.

9- P.W.6, Heera Singh has stated that on 17-6-1984 at about 4.30 P.M. when he reached near the shop of Sri Ram, appellant Mahendra Singh came out of the hut of Sukh Lal and abused him. He asked this witness as to why he had made his complaint to the Head Constable and started beating him with fists and kicks. On his alarm Janardan Pathak and Mohan Singh also reached there and they intervened. This witness deposed that he came to Haldwani to lodge the report of the incident and got himself medically examined. On the next day he came to know that appellant Mahendra Singh had fired gun shot at Janardan. This witness has proved his injury report Ext. Ka.12 and following injuries were found on his person:-

1- Lacerated wound 1 cm x .5 cm x.5 cm on dorsum of right thumb bleeding . Margins irregular.

2- Contusion 4cm x 2cm over bed of right shoulder. Colour was redish.

3- Complaint of pain on back of neck but no external mark of injury and no tenderness was there.

4- Complaint of pain on right leg below knee joint. No external mark of injury. Shows tenderness.

10- P.W.7, Surendra Singh Bisht, A.C.F. is the witness of inquest, held on the dead body of the deceased. This witness has

deposed that the dead body of the deceased was brought to P.S. Rudrapur, as sufficient number of employees were assembled at the spot and there was likelihood of mishappening. This witness deposed that on 18.6.1984 in between 10.30 A.M. and 11.00 A.M. inquest was held on the dead body of the deceased by the Addl. S.D.M. He has proved the inquest report, Ext. Ka. 2.

11- P.W.9 Tribhuwan Singh has stated on oath that at the time of the incident he was taking training at Tanda Range, Kendriya Van Prabhag, Haldwani On 17.6.94 at the time of incident he was at Peepal Parao Gate. He heard the noise of firing and when he reached at the place of the occurrence he saw that gun shot was hit to deceased Janardan and he was writhing in pain. When he asked the deceased, he had told him that gun shot was fired at him by Mahendra Singh, as he had tried to pacify the dispute between the appellant and Heera Singh. This witness further stated that the deceased had given his dying declaration before him and Sugreev Sabhapati. He has also deposed that he recorded the dying declaration of deceased in the presence of other witnesses. This witness has proved the alleged dying declaration Ext. Ka.3.

12- P.W.10, J.P. Singh has stated that on 17.6.84 he was posted as S.S.I. P.S. Rudrapur and in his presence case crime No. nil, U/Ss 342,353,332 I.P.C. was got registered on the information of the appellant and also deposited the rifle and cartridge handed over by the appellant, at the police station. This witness has proved the Fard, Ext. Ka.6. He has also deposed that the appellant had injuries on his person, hence he was sent to hospital along with Head Moharir. This witness also stated that he along with police force reached at the spot and brought the dead body of the deceased at P.S. Rudrapur, and sent R.T. message to D.M., S.S.P. and S.D.M. Haldwani and S.O. Lalkuan to appoint S.D.M. for performing inquest on the dead body of the deceased.

13- P.W.11, Ajai Pal Singh, has investigated the case and narrated the steps taken by him during the investigation and proved the prosecution papers. This witness also stated that he himself investigated the cross case and submitted final report in that case.

14- The appellant in his statement U/S 313 Cr.P.C. has denied the prosecution allegations and has stated that he has been falsely implicated in the crime. He has also alleged that on the day of the occurrence he was on his duty and at about 7.15 P.M. he got information that some miscreants were taking liquor in the hut of Janardan Pathak and he at once went there to raid the place. The deceased came out of his hut with knife in his hand and he assaulted him with knife and his shoe. Some miscreants were also with him. Looking to them, he went behind and at this shot was fired from his service rifle which hit to Janardan Pathak who died at the spot.

15- The appellant has examined D.W.1, Dr. M.N.Joshi, in his defence. This witness has deposed that on 17.6.1984 he was posted as Medical Officer Jawahar Lal Nehru Hospital, Rudrapur. On that day at about 9.00 P.M. he medically examined Mahendra Singh, who was brought by Constable Vijai Pal Singh. The doctor has found the following injuries on his person:-

(i) Abraded contusion just below the right eye (maxillary prominence) size 2cm x 2cm. Fresh oozing present.

(ii) Transverse incised wound lower part of right deltoid muscle 4cm x ¼ cm x skin deep. Oozing present.

(iii)Vertical lacerated wound left chest between right nipple and sternum 7 cm x ¼ cm x skin deep. Oozing present.

(iv) Lacerated wound left deltoid muscle (transversely oblique) 4 cm x 1/3 cm x skin deep. Oozing present.

Complaint of pain in abdomen and chest. No apparent external injury or disease seen. It was alleged that he was beaten by hands and feet. Complaint of pain on head.

In the opinion of this witness injury Nos.1, 3 and 4 were caused by blunt object whereas injury No.2 was caused by some sharp weapon, like knife. All the injuries were fresh and simple in nature.

16- The trial Judge, after assessment of the evidence on record and hearing the learned counsel for the parties, found that the prosecution was successful in proving its case U/S 302 I.P.C.

against the appellant and convicted him as well as sentence him to life imprisonment.

17- Feeling aggrieved, the accused/appellant has come up in appeal.

18- We have heard the learned counsel for the appellant, learned G.A. and perused the evidence on record.

19- First of all it is to be considered whether there is any inordinate delay in lodging the first information report of the incident at the Police Station or not. To consider this aspect, we find from the evidence on record that the incident took place on 17-6-1984 at about 6.50 P.M. The place of the occurrence is Tanda Crossing, Police Station, Lalkuan District Nainital. The distance of the Police Station Lalkuan from the place of the occurrence is approximately nine kilometers. The first information report at the Police Station has been lodged by Ram Kishore Singh, P.W.1. on same day at 8.45 P.M. The informant is the Range Officer in the Forest Department. He got the message from Chatur Singh P.W.2 that constable Mahendra Singh had shot dead Gatekeeper Janardan Pathak. On receiving this information, the complainant went at the spot and saw that Janardan Pathak was lying dead. Thereafter the complainant scribed the report at the spot and proceeded for police Station in order to lodge the same. The complainant has stated in his cross-examination that he went at the spot along with Chatur Singh, who had informed him about the incident, then on the saying of Chatur Singh he scribed the report and thereafter he proceeded to Police Station and he reached over there at about 8-30 P.M. Keeping in view the statement of complainant/informant, we are of the positive view that there is no inordinate delay in lodging the first information report at the Police Station. The evidence on record shows that there was no time for deliberations and fabricating a false case against the appellant by the complainant side. Therefore the first information report in any case cannot be said to be delayed.

20- The second important aspect in this case is the MOTIVE. The prosecution has produced P.W.2, Chatur Singh, P.W.3, Indra Singh, P.W.4, Ramesh Chandra Joshi, P.W.5, Jagdish Chandra

Kothari and P.W.8 Dungar Singh as eye witnesses of the incident. These witnesses have also deposed in their evidence before the court that the appellant was involved in the trade of illicit liquor along with one Sukh Lal and he had also illicit relations with the daughter of Sukh Lal. The appellant had some altercation with the deceased on the aforesaid topic and he exhorted the deceased first and thereafter shot him dead with his rifle. Chatur Singh in his cross-examination has also deposed that the appellant asked the deceased as to why he made complaint against him with regard to his involvement in the trade of the illicit liquor, to the higher authorities. The deceased replied that he in fact had not complained to any one but hearing the reply of the deceased the appellant shot him dead. P.W.3, Indra Singh has also stated the same thing that Mahendra Singh asked the deceased as to why he made the complaint and when the deceased replied that he had not made any complaint, the appellant fired at Janardan Pathak the deceased, due to which Janardan Pathak fell down on the earth and died at the spot. P.W.4, Ramesh Chandra Joshi, P.W.5, Jagdish Chandra Kothari and P.W.8, Dungar Singh have also supported the statement of P.W.2 and P.W.3 by deposing the same thing. In this context the statement of P.W.6 Heera Singh is also relevant. This witness has deposed that on the date of the incident, i.e., 17.6.1984 at about 4 P.M. he went to the house of Sri Ram to take the tea and when he reached near the Gate at about 4.30 P.M., then he saw appellant Mahendra Singh in front of the hut of Sukh Lal. This witness has also deposed that Mahendra Singh started abusing him by saying that why he had made his complaint for his involvement in the trade of illicit liquor to the higher authorities. This witness has also deposed that the appellant also assaulted him with kicks and fists and it was Janardan Pathak who intervened in the matter. This witness has also stated that he went to Haldwani for reporting this matter and also got himself medically examined. Thus the entire evidence available on the record clearly establishes this aspect that the appellant Mahendra Singh had a motive to commit this crime as he had a grudge in his mind that it was the deceased Janardan

Pathak who made his complaint to the higher authorities. The appellant could not tolerate it and committed this crime.

21- The prosecution has produced five eye witnesses of the incident who have clearly deposed in their statements that it was the appellant who fired at Janardan Pathak causing gun shot injuries on his person and on account of the same Janardan Pathak died at the spot. We don not find any discrepancy in the statements of the eye-witnesses. The eye-witnesses account appear to be quite credible, trustworthy and without any embellishment. All the eye witnesses in fact have no enmity with the appellant, therefore, the eye witnesses do not have any occasion to falsely implicate the appellant in the commission of the crime. It is a day light incident and the active role of firing at the deceased has been attributed to the appellant. The medical examination report clearly corroborates the ocular version as the doctor who conducted the autopsy on the body of the deceased found one gun shot wound of entry on the right side chest, cavity deep, as well as one gun shot wound of exit on the left side of abdomen, 5cm lateral to umbilicus, 16 cm below the left nipple. No other injury except the gun shot wound was found on the person of the deceased. All the eye witnesses have attributed the role of firing a single shot to the appellant, therefore , we do not find any contradiction between the ocular and the medical version. The time of the injury, as has been stated by the eye witnesses, tallies with the medical version. The eye witnesses have been cross-examined at length by the defence and nothing has come out on record to disbelieve their testimony. The factum of this incident to the extent that deceased Janardan Pathak got the fatal bullet injury by the shot fired by the appellant Mahendra Singh causing the death of Janardan Pathak, is not disputed by the defence. Therefore, it is established beyond reasonable doubt from the evidence available on record that it was appellant Mahendra Singh and none else who fired shot at Janardan Pathak due to which he died at the spot.

22- Apart of the ocular as well as medical version, the another important aspect in this case is the dying declaration of the deceased Janardan Pathak. Ext. Ka.3 is the dying declaration,

which is allegedly recorded by Tribhuwan Singh, P.W.9. This witness has also proved the dying declaration and has stated that when he reached at the spot, he saw that the deceased was writhing in pain due to the injuries sustained by him. He has also deposed that the deceased told him that Mahendra Singh fired at him with his rifle, therefore, this witness recorded his dying declaration in the presence of P.W.8, Dungar Singh. Dungar Singh has also corroborated the statement of Tribhuwan Singh. P.W.3, Indra Singh who is also an eye witness of the incident, has also stated the Tribhuwan Singh recorded the dying declaration of the deceased Janardan Pathak. Thus the statement of Tribhuwan Singh, who has recorded the dying declaration, finds support from the evidence of P.W.3 Indra Singh and P.W.8 Dungar Singh.

23- Learned counsel for the appellant has submitted that the dying declaration is nothing but a waste paper. It has also been submitted by him that in view of the statement of Dungar Singh, P.W.8, one another witness Sugreev Pradhan of the village, also came at the spot and in his presence the dying declaration was recorded, but this material witness has not been produced by the prosecution.

24- We are not impressed by the argument advanced by the learned counsel for the appellant. The statement of Tribuwan Singh, who has recorded the dying declaration, does not suffer from any embellishment. There is nothing on the record which may suggest that the dying declaration was procured by the witnesses under the suspicious circumstances. There is also nothing on the record that the dying declaration of the deceased Janardan Pathak is a result of tutoring. The defence had sufficient opportunity before the trial court of questioning the veracity of the statement of the witness, who had recorded the dying declaration, by cross-examination. We do not find any material on the record which may suggest that the dying declaration can be said to be unreliable, tainted or a result of some fabrications.

25- Learned counsel for the appellant has emphatically stressed on this aspect of the matter that the appellant had in fact exercised the right of his private defence and during the course of

exercising the right of private defence, this act was committed, therefore, the appellant in fact did not commit any crime of murder. It has also been submitted that the appellant was in fact assaulted by Janardan Pathak and during that assault the trigger of the rifle was pushed and this incident occurred. Our attention has also been invited towards the medical examination report of the appellant Mahendra Singh in order to show that he in fact sustained injuries by the assault of the deceased Janardan Pathak and in order to save himself, he exercised the right of private defence.

26- We have carefully examined this aspect.

27- The Hon'ble Supreme court in a decision **"Rizan and another versus State of Chhattisgarh"** reported in **2003 Supreme Court Cases (Cri) 664,** has propounded the law pertaining to the right of private defence by observing that 'the burden of proof with regard to the plea of right of private defence is on the accused who sets off the plea of self-defence and in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence.' The Hon'ble Supreme Court has further observed that 'where the right of private defence is pleaded, the defence must come out with a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.'

28- The Hon'ble Apex Court in a decision **"Anil Kumar versus State of U.P."** reported in **2005 Supreme Court Cases (Cri) 178,** has also observed that ' the plea of acting in exercise of right of private defence cannot be accepted merely because such a statement was made by accused under Section 313 Cr. P.C.' It has been further observed that 'only minor and superficial injuries sustained by the accused will not establish that the accused had fired gun-shot which resulted the death of the deceased in exercise of right of private defence.'

29- It is thus clear that the right of private defence commences as soon as reasonable apprehension of threat to the body becomes

Imminent. Such situations should pragmatically viewed and hyper-technical approach should be avoided in considering what happened on the spur of the moment. Right to defend does not include a right to launch an offence, particularly when need to defend does not survive.

30- In the light of the aforesaid discussion, if the evidence of this case is scrutinized, then we come to the definite conclusion that the appellant could not establish the right of private defence. The evidence on record does not indicate that there was a reasonable apprehension of threat to the body which made the right of defence imminent. The injuries sustained by the appellant are so simple and minor in nature that the same would not have given an imminent danger to his life. Moreover the statement of the appellant itself makes the story of right of private defence doubtful as he has taken the plea that the deceased gave him several knife blows on his person while there is only one minor incised wound that too skin deep. The doctor opined that the injury No.2 which is a trasverse incised wound skin deep is caused by sharp weapon. The doctor also opined that the injury was simple in nature. This injury was found by the doctor on the lower part of right deltoid muscle 4cm x ¼ cm x skin deep. The eye witnesses account produced by the prosecution nowhere indicates that the appellant in fact suffered any injury during the course of the incident. It is noteworthy to mention here that as soon as this incident was occurred, the accused fled away from the spot. The appellant being a police constable is also law knowing person. He did not surrender himself in the Police Station, Lalkuan, but surrendered himself in the Police Station, Rudrapur and lodged the report against the deceased Janardan Pathak. No reason has been advanced by the appellant as to why he did not surrender himself in the Police Station Lalkuan. The case lodged by the appellant against the deceased Janardan Pathak was investigated by P.W.11, S.I. Ajai Pal Singh, who submitted the final report in the court, therefore, it is quite clear that the case of the appellant, as mentioned by him in his report, was found false and incorrect. The appellant also did not agitate against

submission of the final report by the Investigating Officer before any competent court of law. Perusal of the statement of the appellant shows that on 17-6-1984 at 6 P.M. when he was on duty, came to the hut of deceased Janardan Pathak and asked him to come out. At this Janardan Pathak came out and assaulted him with his shoe and knife. The appellant on this apprehended danger to his life, aimed his rifle, which suddenly went off causing the death of deceased. The statement of the appellant itself establishes this fact that he committed the murder of deceased. As far as the right of private defence is concerned, in case if the appellant claims so, he must show that there were circumstances giving rise to reasonable grounds for apprehending that either the death or grievous hurt would be caused to him and in the present case there was no occasion or reasonable apprehension of danger to cause death of the appellant and as such the action of putting off the trigger on the rifle by the appellant was not justified. As we have already discussed above that the appellant instead of surrendering himself to the Police Station, Lalkuan went to Police Station, Rudrapur and lodged the report there at 8.15 P.M., therefore, this situation makes the picture quite clear that the appellant got sufficient time to manufacture the injuries on his person in order to launch a false case of self-defence. Therefore, in case for the sake of argument, if it is accepted that the appellant exercised the right of private defence, then it becomes quite clear that he exceeded his right of private defence as he was not supposed to use proportionate force as demanded by the circumstances.

31- From the above discussion we come to the conclusion that the prosecution has established the guilt of the appellant beyond reasonable doubt. The appellant has rightly been convicted and sentences by the trial court. We do not find any ground to interfere in the impugned judgment and order passed by the trial court, convicting and sentencing the appellant.

32- In view of above discussion the present appeal has no force and is liable to be dismissed.

33- The appeal is dismissed. The impugned judgment and order dated 10-8-1987, convicting the appellant U/S 302 I.P.C. and sentencing him to undergo imprisonment for life, is hereby confirmed.

34- The appellant is on bail. He shall be taken into custody forthwith.

35- Let the record of the court below be returned so that the C.J.M. concerned may take necessary steps to take the appellant in custody in order to serve out the sentence imposed against him.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

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